

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARBELLA CEJA-ZAVALA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No.: C05-355-TSZ-JPD

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Marbella Ceja-Zavala is a federal prisoner currently incarcerated at the Federal Corrections Institution in Dublin, California. She has filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct her 2004 federal court sentence, which respondent opposes. Following a careful review of the parties' papers and the record, this Court concludes that petitioner's § 2255 motion should be DENIED.

FACTS

On July 1, 2003, petitioner entered into a Plea Agreement with the government in which she pleaded guilty to a single count in the indictment charging her with conspiracy to distribute approximately eight pounds of methamphetamine. Case No. CR03-135-TSZ, Dkt. No. 63. Among other things, petitioner admitted to the following facts:

Beginning at a time unknown, but within the last five years, and continuing until on or about March 7, 2003, . . . [petitioner] knowingly and intentionally did agree to distribute methamphetamine. [Petitioner] became a

01 member of the conspiracy knowing of at least one of its objects, to wit, the
02 distribution of methamphetamine, and intending to help accomplish it.

03 *Id.*

04 Petitioner's crime yielded a base offense level of thirty-four under the Federal
05 Sentencing Guidelines and carried a minimum sentence of ten years. U.S. Sentencing
06 Guidelines Manual§ 2D1.1 ("U.S.S.G."); Dkt. No. 63. In the Plea Agreement, the government
07 and the defendant stipulated that petitioner's total offense level should be decreased by three
08 levels, because she accepted responsibility for her offense and timely notified authorities of her
09 intention to plead guilty, and that it could be decreased by two additional levels pursuant to the
10 safety valve provision of U.S.S.G. § 5C1.2. Dkt. No. 63. On May 7, 2004, the court entered
11 a judgment against petitioner on one count of conspiracy to distribute methamphetamine and
12 sentenced her to incarceration for a period of eighty-seven months (or 7.25 years), three years
13 supervised release, and a \$100 special penalty assessment. Dkt. No. 163. The court waived
14 any fine and, as to her, dismissed the remaining counts in the indictment. *Id.* Petitioner did not
15 file a direct appeal.

16 CLAIMS FOR RELIEF

17 On March 3, 2005, petitioner filed a timely petition under 28 U.S.C. § 2255, seeking
18 to reduce her 2004 federal court sentence. She raises several issues, which essentially
19 constitute two claims. First, petitioner claims that she was sentenced to a term beyond the
20 statutory maximum. Dkt. No. 1. She alleges that this violates the Eighth Amendment, her
21 Fifth Amendment right to due process, and her Sixth Amendment right to a jury trial under
22 *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).¹ *Id.* Second, petitioner claims
23 ineffective assistance of counsel. *Id.* at 26-30. She contends that she was not adequately
24 informed about the proceedings against her and that the facts of her case were not accurately

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26 ¹ In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court specifically applied the holding in *Blakely* to the Federal Sentencing Guidelines. Therefore, this Report and Recommendation will analyze petitioner's arguments under *Booker*.

presented to the court by counsel. *Id.* She further asserts that she did not knowingly and intelligently enter into her Plea Agreement, because she was under the duress of counsel, and that she should be given the opportunity to withdraw the Plea Agreement. *Id.* Finally, petitioner alleges that her First and Fourteenth Amendment rights were violated, because her sentence was based on false information as a result of counsel's failure to raise objections to claimed inaccuracies in her presentence investigation report ("PSR").² *Id.* at 23.

In its response, the government argues that *Booker* does not apply retroactively, that petitioner procedurally defaulted when she did not raise the *Booker-Blakely* issue on direct appeal, and that there was no ineffective assistance of counsel. Dkt. No. 8.

DISCUSSION

A. Petitioner's First Claim Fails, Because *Blakely v. Washington* and *United States v. Booker* Do Not Apply to Cases on Collateral Review and Because Her Sentence Does Not Exceed the Statutory Maximum.

On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington*. In *Blakely*, the Supreme Court addressed a provision of the Washington Sentence Reform Act that permitted a judge to impose a sentence above the statutory range upon finding, by a preponderance of the evidence, that certain aggravating factors justified the sentencing enhancement. *Blakely*, 124 S. Ct. at 2535. In that case, the trial court relied on this provision to impose a sentence that exceeded the top end of the standard range by thirty-seven months. *Id.* The Supreme Court held that this sentence violated the Sixth Amendment, because the facts supporting the sentence were neither admitted by petitioner nor found by the jury. The Court explained, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 2537; *see also Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000).

² Earlier, petitioner correctly identified the Fifth Amendment as potentially applicable. The Fourteenth Amendment is inapplicable, because state action is not involved. U.S. Const. amends. V, XIV § 1. Petitioner does not assert or support a cognizable First Amendment claim.

01 On January 12, 2005, the Supreme Court issued its ruling in *United States v. Booker*.
02 125 S. Ct. 738. In *Booker*, the Supreme Court addressed *Blakely* in the context of the Federal
03 Sentencing Guidelines and concluded that the Sixth Amendment, as construed in *Blakely*,
04 applies to these guidelines as well. *Id.* at 745. The Supreme Court remedied the violation by
05 excising the provision of the Sentencing Reform Act that made the Federal Sentencing
06 Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus rendering them advisory. *Id.* at 764-65.

07 In this case, petitioner claims that her sentence exceeded the maximum penalty under
08 the Federal Sentencing Guidelines and that she is therefore entitled to relief under *Booker*. The
09 Ninth Circuit, however, recently held that *Booker* does not apply retroactively to cases on
10 collateral review. *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005) (per curiam).
11 Petitioner failed to directly appeal her sentence. Because *Booker* does not apply retroactively,
12 petitioner cannot use it to collaterally attack the sentence that was imposed.

13 Additionally, even if the court were able to consider the merits of petitioner's claim, the
14 claim would fail because petitioner's sentence does not exceed the statutory maximum.
15 Accordingly, the sentence does not violate her Eighth Amendment rights.³ Under the Federal
16 Sentencing Guidelines, the maximum penalty for petitioner's crime is "imprisonment for up to
17 life, a mandatory term of imprisonment of ten (10) years, a fine of up to four million dollars
18 (\$4,000,000.00), a period of supervision following release from prison of up to five (5) years,
19 and a one hundred dollar (\$100.00) penalty assessment." U.S.S.G. § 2D1.1; Case No. CR03-
20 135-TSZ, Dkt. No. 63. After giving credit for a timely guilty plea and application of the safety
21 valve, the sentencing range for petitioner's crime was from eighty-seven to one hundred eight
22 months. CR03-135-TSZ, Dkt. No. 180, p. 5-6. The court sentenced petitioner to the bottom
23 of the range. *Id.*

24
25 ³ Petitioner also claims that, because the drug amount was not specified in her
26 indictment, her Fifth Amendment rights were violated. Dkt. No. 1 at 15. This claim has no
merit, because she entered into a Plea Agreement and the judge based his sentence on the
agreed-upon facts therein.

Petitioner's sentence of 7.25 years imprisonment, with no fine, three years of supervised release, and a penalty assessment, is well below the Federal Sentencing Guideline maximum. Petitioner points to no authority that suggests a sentence at the low end of the Federal Sentencing Guidelines is "cruel and unusual," in violation of the Eighth Amendment. Because *Booker* does not apply retroactively to cases on collateral review, and because petitioner's sentence did not exceed the statutory maximum, petitioner's first claim should be dismissed.

B. The Record Does Not Support Petitioner's Ineffective Assistance of Counsel Claim.

Petitioner asserts an ineffective assistance of counsel claim in support of her § 2255 motion. A claim of ineffective assistance of counsel is proper in a § 2255 motion and need not be raised on direct appeal. *Massaro v. United States*, 538 U.S. 500, 508-9 (2003); *United States v. Foreman*, 329 F.3d 1037, 1039 n.1 (9th Cir. 2003). Petitioner's ineffective assistance claim has two parts. First, petitioner argues that she did not knowingly and intelligently enter into her Plea Agreement and that counsel's performance was deficient. Second, she argues that the sentencing court considered false information rather than all relevant evidence during sentencing, because counsel did not raise objections to claimed inaccuracies in her PSR.

The Sixth Amendment right to effective counsel is analyzed under the *Strickland* test, which requires a petitioner claiming ineffective assistance to show (1) counsel's performance was deficient, under an objective standard of reasonableness based upon professional norms; and (2) a reasonable probability that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *see also Earp v. Stokes*, 423 F.3d 1024, 1038 (9th Cir. 2005). In the Ninth Circuit, a federal habeas petitioner who raises such a claim is entitled to an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief." 28 U.S.C. § 2255 ¶ 2; *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003). The court may deny such motion for a hearing if petitioner fails to raise a colorable claim by not alleging specific facts

01 that weigh against the record. *U.S. v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996).

- 02 1. The record does not support petitioner's first allegation
03 that she entered into her Plea Agreement under duress of
04 counsel.

05 A voluntary and intelligent guilty plea, *made upon the advice of competent counsel*,
06 may not be attacked on collateral review. *Marbry v. Johnson*, 467 U.S. 504, 508 (1984)
07 (emphasis added). Petitioner alleges that counsel was unprofessional, frightening, and used
08 fear tactics to force her into signing the Plea Agreement. Dkt. No. 1 at 26. She claims that,
09 although at the sentencing hearing she represented to the court that she was satisfied with
10 counsel's professionalism and representation, her lack of legal knowledge prevents her from
11 being able to say whether she was "professionally represented." *Id.* She further asserts that
12 she answered the court with "Yes" and "No" answers and stated facts to the court at her
13 sentencing hearing as counsel directed her to do, under duress. *Id.* Finally, petitioner alleges
14 counsel never showed her any documents relating to her case and never explained her
15 indictment or the PSR to her. *Id.* at 23, 26 Respondent contends that there is ample evidence
16 of counsel's effectiveness in the record and that there is no need for an evidentiary hearing.
17 Dkt. No. 8.

18 At petitioner's guilty-plea hearing, Magistrate Judge Theiler found "that her plea was
19 made knowingly, intelligently, and voluntarily . . . [and supported by] an independent basis in
20 fact for each and every element of the offense." Case No. CR03-135-TSZ, Dkt. No. 181 at
21 17. The judge asked petitioner whether anyone had threatened her, made promises, or forced
22 her into signing the Plea Agreement, to which petitioner responded, "No." *Id.* at 12.
23 Petitioner also testified under oath that she was satisfied by the representation she had
24 received from her attorney. *Id.* at 6-7. Magistrate Judge Theiler read aloud portions of the
25 Plea Agreement and asked petitioner questions through a Spanish interpreter. Case No.
26 CR03-135-TSZ, Dkt. No. 181. She repeatedly asked petitioner and her counsel simple
questions regarding the Plea Agreement and asked petitioner a number of times whether

01 various portions were accurate and whether petitioner wanted to enter into the Plea
02 Agreement. *Id.* She further asked petitioner whether she understood that, even though the
03 Plea Agreement recommends a sentence reduction, the sentencing judge “doesn’t have to
04 accept that recommendation . . . [the district judge] would able to impose any sentence that’s
05 allowable, up to the maximum.” *Id.* at 12. Petitioner responded in the affirmative. *Id.* When
06 asked whether she pleaded guilty or not guilty, petitioner said, “Guilty.” *Id.*

07 The foregoing discussion establishes that there is ample evidence in the record to show
08 that petitioner understood the charges against her, as well as the substance and consequences
09 of her Plea Agreement. There is no evidence that she was unfamiliar with her Plea Agreement,
10 the indictment, or the charges against her. Petitioner has not alleged any specific instances of
11 duress, or any other particular acts or omissions that might have prejudiced her case, as
12 required under *Strickland*. Dkt. No. 1; *Strickland*, 466 U.S. at 690.

13 In addition, the evidence of record indicates that petitioner’s counsel was effective
14 under an objective standard of reasonableness. Her counsel was able to persuade the
15 government and the court to grant a safety-valve reduction, and she was sentenced to the
16 lowest end of the sentencing range. CR03-135-TSZ, Dkt. No. 180, p. 5-6. Accordingly,
17 petitioner has not raised a colorable claim of ineffective assistance of counsel and cannot
18 prevail on the claim that she did not knowingly and intelligently enter into her Plea Agreement.

19 2. The record does not support petitioner’s second
20 allegation that counsel did not raise objections to
21 inaccuracies in her PSR and thus prevented the
sentencing court from considering all relevant evidence.

22 To prove a due process claim based upon false information used in sentencing, the
23 petitioner must establish (1) that there was false or unreliable information in the PSR and (2)
24 that the judge relied upon such information as the basis for the sentence. *United States v.*
25 *Ching*, 682 F.2d 799, 801 (9th Cir. 1982). Petitioner contends that she objected to the PSR
26 numerous times, but that counsel would not formally present those objections in court. Dkt.
No. 1 at 22-23. Although petitioner asserts that the PSR “contained several factual

01 inaccuracies” and that counsel never notified the court of those discrepancies, petitioner has
02 failed to identify any alleged inaccuracies to this Court. Dkt. No. 1 at 22.

03 In addition, petitioner’s counsel appears to have changed some information in the PSR
04 as evidenced by his April 26, 2004 memorandum, which states that he and petitioner reviewed
05 the PSR and “[a]ll necessary corrections and additions were submitted to probation and
06 incorporated in the supplemental.” Case No. CR03-135-TSZ, Dkt. No. 156. He further
07 submitted that he and petitioner agreed with the PSR “in all essential respects.” *Id.* At the
08 time of sentencing, petitioner addressed the court before sentence was imposed and chose not
09 notify the court of any of the alleged inaccuracies in the PSR. Case No. CR03-135-TSZ, Dkt.
10 No. 180, p. 9-10.

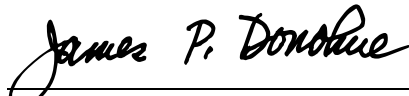
11 Finally, it appears that the PSR and Plea Agreement contained essentially the same
12 information regarding penalties. The Sentencing Judge noted that he was relying on the PSR
13 and counsel’s accompanying memorandum and that the guideline range was a net level twenty-
14 nine, yielding a sentence of eighty-seven to one hundred eight months incarceration. Case No.
15 CR03-TSZ, Dkt. No. 180 at 4-6. This is the same range noted in petitioner’s Plea Agreement.
16 Case No. CR03-TSZ, Dkt. No. 63 at 2. As the petitioner knowingly and intelligently agreed to
17 this sentencing range in her Plea Agreement, she cannot now state that the judge did not
18 consider all relevant evidence.

19 Because petitioner was represented by competent counsel, because she knowingly and
20 intelligently entered into her Plea Agreement, and because the sentencing judge relied on
21 information in the PSR that was commensurate with information contained in the Plea
22 Agreement, she cannot succeed on her ineffective assistance of counsel claim. Therefore, her
23 second claim should be dismissed.

CONCLUSION

For the reasons set forth above, petitioner's § 2255 motion should be DENIED. A proposed order accompanies this Report and Recommendation.

DATED this 17th day of November, 2005.



JAMES P. DONOHUE
United States Magistrate Judge